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Supreme Court, U.S.
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No. 09-164

IN THE
SUPREME COURT OF THE UNITED STATES

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

On Petition For A Writ of Certiorari To
The Court of Appeals Of The State Of Oregon

PEACEHEALTH'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COMPLIANCE

No. 09-164

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that PeaceHealth's Response to Petition for a Writ of Certiorari contains 3,008 words, excluding the parts of the response that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 10, 2009.

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CORPORATE DISCLOSURE

No. 09-164

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP,
a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

In accordance with Supreme Court Rule 30, Respondent PeaceHealth discloses it is a Washington nonprofit corporation and there is no parent or publicly held company owning 10% or more of the corporation's stock.

Executed on September 10, 2009.

ERIC S. DeFREEST
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OPINION BELOW

The Oregon Court of Appeals affirmed the trial court judgment without opinion. App. 1-2. The Oregon Supreme Court is a court of discretionary review and issued an Order Denying Review. Oregon Rules of Appellate Procedure (ORAP) 9.07; App. 6-7. The Oregon courts have neither considered nor passed upon any federal question, including Petitioner's claim for failure of due process.

JURISDICTION

Petitioner asserts jurisdiction exists under 28 USCA §1257(a) to "review the state supreme court's opinion."[1] However, there is no jurisdiction under 28 USCA §1257(a) because the Oregon courts neither considered nor passed upon Petitioner's claim for failure of due process. *Webb v. Webb*, 541 U.S. 493, 495-497, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

The Petitioner asserts in his characterization of a Federal Question (Petition, p.2) that there existed a "pre-trial ruling on a critical causation instruction to be presented to the jury; the instruction is confirmed by two orders during the course of trial". In contrast, neither the asserted pre-trial ruling nor the asserted two orders are presented in the Petition for Writ of Certiorari or its appendices for consideration by the

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[1]The Petitioner's cover cites that it seeks a Writ of Certiorari to the Court of Appeals of the State of Oregon instead of the Oregon Supreme Court.

Court. The Petitioner fails to establish that the federal question sought to be reviewed was timely and properly raised in accordance with Supreme Court Rule 14.1(g)(i).

SUMMARY OF FACTS

Kyle Richmond was a student at the University of Oregon. On April 24 and 25, 2003, Kyle Richmond took two ingestions of medications and presented himself for treatment at the Sacred Heart Medical Center emergency department. He was initially treated and evaluated by Dr. Kenneth Starr an employee of Eugene Emergency Physicians, PC. Paula Burchett a crisis worker at Sacred Heart Medical Center also conducted an evaluation of Kyle Richmond. Dr. Starr and Paula Burchett agreed that Kyle Richmond presented a "low risk for further self-harm". On April 25, 2003, Dr. Starr discharged Kyle Richmond and he was escorted home by his sister, Shelbi Whiddon.

The discharge instructions directed Kyle Richmond to follow-up for outpatient treatment at the University of Oregon, but directed him to return to the emergency department if he experienced any worsening symptoms. Kyle Richmond did not return to the Sacred Heart Medical Center after April 25, 2003. However, he did follow the discharge instructions by presenting to the University of Oregon Student Health Center on Monday morning, April 28, 2003 and began treatment with psychiatrist Dr. Jerome Vergamini. Dr. Vergamini continued to be Kyle Richmond's treating psychiatrist from April 28, 2003, through the time Kyle

Richmond committed suicide on May 15, 2003.

At trial, the plaintiff asserted a claim for wrongful death against defendant PeaceHealth based upon three allegations of negligent acts or omissions. Defendant PeaceHealth denied negligence. Neither party alleged any claim of comparative negligence by the Petitioner's decedent, Kyle Richmond. After trial on the merits, the jury delivered a verdict in favor of the defendant on the question, "Was the defendant negligent in one or more of the ways alleged by plaintiff which caused the death of Kyle Dalton Richmond?" by answering "No." App.3-5.

ARGUMENT

The Petitioner seeks the Court's review by claiming that the state trial court violated his rights of due process as granted by the 14th Amendment of the U.S. Constitution, which states in pertinent part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S.C.A. Const. Amend XIV, § 1.

Petitioner's underlying civil case was a statutory claim seeking monetary compensation following the suicide of his son. Petitioner characterizes the claimed violation of due process as "submitting instructions to the jury that were contradictory to what the court led counsel to believe it would submit during the trial and so fundamentally unfair as to deprive Petitioner of a fair trial and to due process of law." The petition is

fundamentally flawed because it fails to identify any deprivation of life, liberty or property by the state of Oregon without due process of law.

Petitioner does not establish jurisdiction

Petitioner claims jurisdiction exists under 28 USCA §1257(a) seeking review of the state supreme court's opinion. Petition, p. 1. However, there was no opinion issued by the Oregon Supreme Court. The Oregon Supreme Court is a court of discretionary review and simply issued an order denying review. Petition, App. 6-7.

(A) Federal question. The Supreme Court's jurisdiction to review a state court decision under 28 USCA §1257 is dependent upon the presence of a federal question in the case. The Supreme Court is not a court of general jurisdiction; its powers are limited to correcting denials of federal rights in specific instances. *Walters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 106, 29 S.Ct. 220, 53 L.Ed. 417 (1909). The Supreme Court's jurisdiction is limited to issues pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin. *Id.* Respondent PeaceHealth respectfully submits that the petition does not present a substantial federal question and that Petitioner's claimed violation of due process was neither presented to nor passed upon by the Oregon Supreme Court.

(B) Mootness. The federal question raised in a case taken to the United States Supreme Court from a state court may not be abstract or moot. The federal

question must raise a live controversy and must affect the rights of the litigants in the proceeding. *See, North Carolina v. Rice*, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

Petitioner argues that an instruction based on *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979), should have been given by the trial court which in practical application would have directed a verdict in plaintiff's favor upon a claim of comparative negligence which was never pleaded by the defense. Respondent PeaceHealth respectfully submits that the petition does not present a substantive or procedural due process question for consideration by the court because no claim of comparative negligence was pleaded in order to found a basis for the requested instruction. The matter petitioned is moot and would not affect the rights of the litigants in the proceeding.

(C) Presentation/Jurisdiction. In order to obtain review of a state court decision in the United States Supreme Court, it must affirmatively appear from the record as a whole, either expressly or by clear implication, that the federal claim was adequately presented to the state court and was passed upon by that court.

> "It is a long-settled rule that the jurisdiction of this [U.S. Supreme] Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state

> system." *Webb v. Webb*, 541 U.S. 493, 496-497, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

The claimed violation of due process was not raised by Petitioner during the trial court proceedings in the case at bar. The Oregon Court of Appeals affirmed the trial court judgment without opinion. The Oregon Supreme Court denied discretionary review. The United States Supreme Court has frequently stated that when,

> "* * * the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Webb v. Webb*, 541 U.S. 493, 495, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

Because Petitioner's present contention for violation of due process was neither adequately presented nor passed upon by the state courts of Oregon, this Court's jurisdiction for consideration by writ of certiorari is not established.

<u>Substantive and procedural due process</u>

Petitioner's brief does not state whether he claims deprivation of substantive or procedural due process.

(A) Substantive due process requires that any State action which deprives a person of life, liberty, or property must have a rational basis, and the reason for deprivation may not be so inadequate that the judiciary would characterize it as arbitrary. In contrast, as acknowledged by quotation in the Petition for a Writ of Certiorari, the trial court provided a rational basis for its decision not to give the requested special instruction. The trial court's concern with the requested instruction was not to confuse jurors on the distinction between fault and causation. Petition, p. 6-7.

It is apparent that Petitioner continues to confuse the concepts of fault and causation. At Petition, p. 13, Petitioner misstates the crux of the discussion surrounding the requested jury instruction by stating:

> "In the end, a 'sole cause' jury instruction was given but the special instruction that *decedent could not be found to be the sole cause* of his death was erroneously omitted. Failure to give the instruction was so prejudicial as to infect the entire trial as the absence of the instruction effectively permitted the jury to conclude that *if the decedent was found to be at fault, any negligence of the Defendant was barred.*" (Emphasis added) (Petition, p.13).

Petitioner did not request a special instruction that decedent could not be found to be the sole cause of his

death, nor does *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979) stand as precedent on the concept of causation.[2] Petitioner continues to inappropriately juxtapose the concepts of fault and causation. While Petitioner had the burden of proof on causation, there was no allegation of negligence against Kyle Richmond upon which to justify giving the requested *Cole* instruction. Furthermore, the concept of contributory negligence as a complete bar to recovery was rejected in Oregon in 1971 and replaced by the concept of comparative negligence. Oregon Revised Statutes (ORS) 31.600. Yet again, it should be emphasized that defendant did not allege comparative negligence against the plaintiff's decedent.

Instructions to juries should not deal with issues outside the pleadings and the evidence, and when such instructions are requested they may be refused. *Williamson v. North Pacific Lumber, Inc.*, 43 Or. 337, 73 P. 7 (1903). The trial court may properly refuse a requested charge which is incomplete or argumentative or which might prove misleading or confusing to the jury. *Rauw v. Huling*, 199 Or. 48, 259 P.2d 99 (1953). Petitioner did not have an entitlement to the requested

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[2]Petitioner misstates that "the trial court and subsequent Oregon appellate courts ignored its own precedents to sanction a decision that departs from Oregon law." Petition, p. 10. Contributory negligence was not alleged against Petitioner's decedent, Kyle Richmond. The Petitioner's requested instruction based upon *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979) was not precedent and was not ignored, rather it was deemed an inappropriate instruction on matters outside the pleadings.

instruction. There is no deprivation of life, liberty, or property identified by the Petitioner upon which to base the claimed violation of substantive due process.

(B) Procedural due process mandates that persons whose constitutional rights may be affected are entitled to be heard. The notice and opportunity to be heard must be extended at a meaningful time and in a meaningful manner.

There is no identified deprivation of life, liberty, or property upon which to base the claimed violation of procedural due process. Moreover, the trial court in the case below provided timely notice in accordance with long-established court procedural rules which require that jury instructions be given before counsel proceed with closing argument. Oregon Rules of Civil Procedure (ORCP) 59A; Oregon Uniform Trial Court Rules (UTCR) 6.060.

Oregon law establishes that jury instructions must be based upon the evidence presented during trial. *Williamson v. North Pacific Lumber, Inc.*, 43 Or. 337, 73 P. 7 (1903). As recognized by the Court in *Cupp v. Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), it is a well established proposition that a single instruction to a jury may not be judged in artificial isolation. A judgment is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits and instruction of a jury by the trial judge. The jury instructions are only one of several components to a trial. The trial judge explicitly stated that there was no claim by the defense asking the jury to evaluate the

fault of Petitioner's decedent, Kyle Richmond.[3] A jury is presumed to follow the instructions presented by the court. The decision not to give the Petitioner's requested instruction was not a failure of process which permitted the jury to find Kyle Richmond at fault as characterized by the Petitioner.

Petitioner's question presents no issue of constitutional law for certiorari by the United States Supreme Court. The facts of the case fall squarely within the long-standing procedures of ORCP 59A and UTCR 6.060 whereby the trial court provided appropriate and timely notice of final jury instructions to counsel.

Pursuant to ORCP 59A, proposed jury instructions are to be submitted to the trial court at the commencement of the trial. The rule further allows proposed instructions to be submitted upon questions of law developed by the evidence at any time before the court has instructed the jury. In conjunction with ORCP 59A, UTCR 6.060(5) requires "[t]he court must inform the parties before argument of the instructions that it proposes to give." In the case petitioned, the trial court explicitly made a record prior to closing arguments that jury instructions were finalized and that "I've taken out, Mr. Barton, your requested jury instruction on the *Cole* case." Tr. 882. The trial court appropriately advised counsel of the text of the written

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[3] "The defendant denies it was negligent or caused the death of Kyle Richmond. The defendant has made no claims, and the burden or proof in all issues is on the plaintiff." Jury Instructions Tr. 897, lines 3-6

jury instructions, and actually instructed the jury in open court, prior to closing argument by counsel.[4] The requirements of ORCP 59A and UTCR 6.060(5) were met. Respondent PeaceHealth respectfully submits that the petition does not present a substantial or procedural question of law justifying review by the United States Supreme Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] "THE COURT: Ladies and gentlemen, we're going to do something a little different that I think might be of assistance to you. Normally we would instruct the jury after the attorneys argued, but I'm going to instruct you before they argue so that you know what the law is before you hear the arguments. And that way, I think it will make the arguments more meaningful for you in this particular case." Jury Instructions Tr. 891:20 - 892:2.